Oetken, P.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Guang Ping Zhu, on behalf of himself and all other persons similarly situated,

Plaintiffs,

-against-

Salaam Bombay, Inc. and Ramesh Shah,

Defendants

--- x

Case No.: 16-cv-4091(JPO)(KNF)

STIPULATION GRANTING DEFENDANTS LEAVE TO FILE A FIRST AMENDED ANSWER

IT IS HEREBY STIPULATED by and between the parties hereto through their respective attorneys of record that Defendants may file a first Amended Answer to the Complaint, a copy of which is attached hereto.

Dated: New York, New York
September 14, 2016

Wood, Smith, Henning, and Berman, LLP

By: ___________________________
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IT IS SO ORDERED.

Dated: September 19, 2016

THE ANSWER AT DOCKET NUMBER 21 SHALL BE DEEMED THE OPERATIVE ANSWER.

____
J. PAUL OETKEN
United States District Judge

WOOD, SMITH, HENNING, AND BERMAN, LLP
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--x

Guang Ping Zhu, on behalf of himself and all other persons similarly situated,

Case No.: 16-cv-4091(JPO)(KNF)

Plaintiffs,

-against-

FIRST AMENDED ANSWER TO COMPLAINT

Salaam Bombay, Inc. and Ramesh Shah,

Defendants.

--x

Defendants, SALAAM BOMBAY, INC. and RAMESH SHAH ("Defendants"), by and through their counsel of record, Wood, Smith, Henning, and Berman, LLP, hereby respond to the enumerated paragraphs of the Complaint, filed on June 1, 2016, in the above-captioned action as follows:

1. Defendants admit that plaintiff purports to bring the instant action for alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*, and purports to bring federal law claims as a collective action, pursuant to 29 U.S.C. § 216(b), as alleged in paragraph 1 of the Complaint, but deny the remaining allegations and any wrongdoing.

2. Defendants admit that plaintiff purports to bring this action for alleged violations of the New York Labor Law §§ 650 *et seq.* ("NYLL"), the supporting New York State Department of

Labor regulations and the Wage Theft Prevention Act, as alleged in paragraph 2 of the Complaint, but deny the remaining allegations and any wrongdoing.

THE PARTIES

3. Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph 3 of the Complaint and leave all questions of law to the Court.

4. Defendants admit a written consent purported to be signed by plaintiff is attached to plaintiff's Complaint. Defendants deny the remaining allegations contained in paragraph 4 of the Complaint and leave all questions of law to the Court.

5. Defendants admit the allegations contained in paragraph 5 of the Complaint.

6. Defendants admit defendant Salaam Bombay, Inc. is an employer engaged in commerce and deny knowledge or information to form a belief as to the remaining allegations contained in paragraph 6 of the Complaint and leave all questions of law to the Court.

7. Defendants admit the allegations contained in paragraph 7 of the Complaint.

8. Defendants admit Salaam Bombay, Inc. employees at least two or more individuals that handle good and materials in interstate commerce and deny knowledge or information to form a belief as to the remaining allegations contained in paragraph 8 of the Complaint and leave all questions of law to the Court.

9. Defendants admit Salaam Bombay, Inc. constitutes an "enterprise" as defined in the FLSA and deny knowledge or information to form a belief as to the remaining allegations contained in paragraph 9 of the Complaint and leave all questions of law to the Court.

10. Defendants admit defendant Ramesh Shah is the owner of the entity Salaam Bombay. Defendants deny the remaining allegations contained in paragraph 10 of the Complaint and leave all questions of law to the Court.

11. Defendants deny the allegations contained in paragraph 11 of the Complaint and leave all questions of law to the Court.

12. Defendants deny the allegations contained in paragraph 12 of the Complaint and leave all questions of law to the Court.

JURISDICTION AND VENUE

13. Defendants admit the allegations contained in paragraph 13 of the Complaint.

14. Defendants admit the allegations contained in paragraph 14 of the Complaint.

COLLECTIVE ACTION ALLEGATIONS

15. Defendants admit plaintiff purports to prosecute his FLSA claims as a collective action as alleged in paragraph 15 of the Complaint, but deny the remaining allegations and any wrongdoing.

16. Defendants deny the allegations contained in paragraph 16 of the Complaint.

17. Defendants deny the allegations contained in paragraph 17 of the Complaint.

18. Defendants deny knowledge or information sufficient to form a belief as to all allegations contained in paragraph 18 of the Complaint.

FACTS

19. Defendants admit defendant Ramesh Shah owns Salaam Bombay Inc. and admit Salaam Bombay Inc. operates as an Indian Restaurant in New York. Defendants deny the remaining allegations contained in paragraph 19 of the Complaint and leave all questions of law to the Court.

20. Defendants deny knowledge or information sufficient to form a belief as to all allegations contained in paragraph 20 of the Complaint.

21. Defendants admit an individual identifying himself as the plaintiff delivered food for Salaam Bombay, Inc. Defendants deny knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 21 of the Complaint and leave all questions of law to the Court.

22. Defendants admit plaintiff performed worked as a delivery person. Defendants deny the remaining allegations contained in paragraph 22 of the Complaint and leave all questions of law to the Court.

23. Defendants admit plaintiff delivered food for Salaam Bombay, Inc. Defendants deny the remaining allegations contained in paragraph 23 of the Complaint and leave all questions of law to the Court.

24. Defendants deny the allegations contained in paragraph 24 of the Complaint.

25. Defendants deny the allegations contained in paragraph 25 of the Complaint.

26. Defendants deny the allegations contained in paragraph 26 of the Complaint.

27. Defendants deny the allegations contained in paragraph 27 of the Complaint.

28. Defendants deny the allegations contained in paragraph 28 of the Complaint.

29. Defendants knowledge or information sufficient to form a belief as to all allegations contained in paragraph 29 of the Complaint.

30. Defendants deny the allegations contained in paragraph 30 of the Complaint.

31. Defendants deny the allegations contained in paragraph 31 of the Complaint.

32. Defendants deny the allegations contained in paragraph 32 of the Complaint

33. Defendants deny the allegations contained in paragraph 33 of the Complaint.

34. Defendants deny as phrased as to the term "employment," admit plaintiff was paid in cash from time to time and deny knowledge or information sufficient to form a belief as to all remaining allegations contained in paragraph 34 of the Complaint.

35. Defendants deny the allegations contained in paragraph 35 of the Complaint.

36. Defendants deny the allegations contained in paragraph 36 of the Complaint.

37. Defendants deny the allegations contained in paragraph 37 of the Complaint.

38. Defendants deny as phrase and deny knowledge or information sufficient to form a belief as to all remaining allegations contained in paragraph 38 of the Complaint.

39. Defendants deny as phrase and deny knowledge or information sufficient to form a belief as to all remaining allegations contained in paragraph 39 of the Complaint.

40. Defendants deny the allegations contained in paragraph 40 of the Complaint.

41. Defendants deny the allegations contained in paragraph 41 of the Complaint.

42. Defendants deny the allegations contained in paragraph 42 of the Complaint.

43. Defendants deny the allegations contained in paragraph 43 of the Complaint.

44. Defendants deny the allegations contained in paragraph 44 of the Complaint.

45. Defendants deny the allegations contained in paragraph 45 of the Complaint.

46. Defendants deny the allegations contained in paragraph 46 of the Complaint.

47. Defendants deny the allegations contained in paragraph 47 of the Complaint.

COUNT I
(FAIR LABOR STANDARDS ACT – MINIMUM WAGE)

48. As to paragraph 48 of the Complaint, Defendants repeat and reiterate, as if more fully set forth herein, the foregoing responses set forth in paragraphs 1 through 47 *infra*.

49. Defendants deny the allegations contained in paragraph 49 of the Complaint and leave all questions of law to the Court.

50. Defendants deny the allegations contained in paragraph 50 of the Complaint.

51. Defendants deny the allegations contained in paragraph 51 of the Complaint.

52. Defendants deny the allegations contained in paragraph 52 of the Complaint.

53. Defendants deny the allegations contained in paragraph 53 of the Complaint.

COUNT II

(NEW YORK LABOR LAW – MINIMUM WAGE)

54. As to paragraph 54 of the Complaint, Defendants repeat and reiterate, as if more fully set forth herein, the foregoing responses set forth in paragraphs 1 through 53 *infra*.

55. Defendants deny the allegations contained in paragraph 55 of the Complaint and leave all questions of law to the Court.

56. Defendants deny the allegations contained in paragraph 56 of the Complaint.

57. Defendants deny the allegations contained in paragraph 57 of the Complaint.

58. Defendants deny the allegations contained in paragraph 58 of the Complaint.

COUNT III

(FAIR LABOR STANDARDS ACT – OVERTIME)

59. As to paragraph 59 of the Complaint, Defendants repeat and reiterate, as if more fully set forth herein, the foregoing responses set forth in paragraphs 1 through 58 *infra*.

60. Defendants deny the allegations contained in paragraph 60 of the Complaint and leave all questions of law to the Court.

61. Defendants deny the allegations contained in paragraph 61 of the Complaint.

62. Defendants deny the allegations contained in paragraph 62 of the Complaint.

63. Defendants deny the allegations contained in paragraph 63 of the Complaint.

64. Defendants deny the allegations contained in paragraph 64 of the Complaint.

COUNT IV

(NEW YORK LABOR LAW – OVERTIME)

65. As to paragraph 65 of the Complaint, Defendants repeat and reiterate, as if more fully set forth herein, the foregoing responses set forth in paragraphs 1 through 64 *infra*.

66. Defendants deny the allegations contained in paragraph 66 of the Complaint and leave all questions of law to the Court.

67. Defendants deny the allegations contained in paragraph 67 of the Complaint.

68. Defendants deny the allegations contained in paragraph 68 of the Complaint.

69. Defendants deny the allegations contained in paragraph 69 of the Complaint.

COUNT V

(NEW YORK LABOR LAW – SPREAD OF HOURS)

70. As to paragraph 70 of the Complaint, Defendants repeat and reiterate, as if more fully set forth herein, the foregoing responses set forth in paragraphs 1 through 69 *infra*.

71. Defendants deny the allegations contained in paragraph 71 of the Complaint and leave all questions of law to the Court.

72. Defendants deny the allegations contained in paragraph 72 of the Complaint.

73. Defendants deny the allegations contained in paragraph 73 of the Complaint.

74. Defendants deny the allegations contained in paragraph 74 of the Complaint.

COUNT VI

(NEW YORK LABOR LAW – UNLAWFUL DEDUCTIONS)

75. As to paragraph 75 of the Complaint, Defendants repeat and reiterate, as if more fully set forth herein, the foregoing responses set forth in paragraphs 1 through 74 *infra*.

76. Defendants deny the allegations contained in paragraph 76 of the Complaint and leave all questions of law to the Court.

77. Defendants deny the allegations contained in paragraph 77 of the Complaint.

78. Defendants deny the allegations contained in paragraph 78 of the Complaint.

79. Defendants deny the allegations contained in paragraph 79 of the Complaint.

80. Defendants deny the allegations contained in paragraph 80 of the Complaint.

81. Defendants deny the allegations contained in paragraph 81 of the Complaint.

82. Defendants deny the allegations contained in paragraph 82 of the Complaint.

83. Defendants deny the allegations contained in paragraph 83 of the Complaint.

84. Defendants deny the allegations contained in paragraph 84 of the Complaint.

COUNT VII

(NEW YORK LABOR LAW – ILLEGAL TIP RETENTION)

85. As to paragraph 85 of the Complaint, Defendants repeat and reiterate, as if more fully set forth herein, the foregoing responses set forth in paragraphs 1 through 84 *infra*.

86. Defendants deny the allegations contained in paragraph 86 of the Complaint and leave all questions of law to the Court.

87. Defendants deny the allegations contained in paragraph 87 of the Complaint.

88. Defendants deny the allegations contained in paragraph 88 of the Complaint.

89. Defendants deny the allegations contained in paragraph 89 of the Complaint.

COUNT VIII

(NEW YORK LABOR LAW – WAGE THEFT PREVENTION ACT)

90. As to paragraph 90 of the Complaint, Defendants repeat and reiterate, as if more fully set forth herein, the foregoing responses set forth in paragraphs 1 through 89 *infra*.

91. Defendants deny the allegations contained in paragraph 91 of the Complaint and leave all questions of law to the Court.

92. Defendants deny the allegations contained in paragraph 92 of the Complaint.

93. Defendants deny the allegations contained in paragraph 93 of the Complaint.

94. Defendants deny the allegations contained in paragraph 94 of the Complaint.

95. Defendants deny the allegations contained in paragraph 95 of the Complaint.

PRAYER FOR RELIEF

Defendants deny plaintiffs are entitled to any of the relief described in the unnumbered "Prayer for Relief" and "Wherefore" paragraph as it appears at the end of the Complaint.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Complaint must be dismissed for lack of personal jurisdiction and failure to make sufficient service of process on one or all of the defendants.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in full or in part by the doctrines of waiver, laches, estoppel, unclean hands, and other equitable defenses.

FOURTH AFFIRMATIVE DEFENSE

By virtue of the action of plaintiff or his agents, he is estopped from asserting any claims or seeking to recover damages as alleged in his Complaint.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff has failed to mitigate damages, if, in fact, any damages are proven.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in full or in party by the applicable status of limitations, including the statute of limitations provided by the Fair Labor Standards Act and the New York Labor Law.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the *de minimis* doctrine.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff is not entitled to equitable relief insofar as he has an adequate remedy by law.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred or limited by defendants' good faith efforts to comply with applicable law.

TENTH AFFIRMATIVE DEFENSE

Payments to plaintiff were made in good faith and in conformity with and in reliance on an administrative regulation, order, ruling, approval, interpretation, administrative practice, and/or enforcement policy of the United States Department of Labor and/or New York State Department of Labor.

ELEVENTH AFFIRMATIVE DEFENSE

Defendants affirmatively deny plaintiff is entitled to the relief prayed for in the Complaint or to any other relief.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred or should be reduced, in whole or in part, by exclusions, exceptions, credits, recoupment, or other offsets permissible under the Fair Labor Standards Act and the New York Labor Law.

THIRTEENTH AFFIRMATIVE DEFENSE

Defendants are entitled to offset overpayment to plaintiffs or monies or other consideration paid or provided to plaintiffs by defendants for periods in which plaintiffs were not engaged to work.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff cannot establish a willful violation under the FLSA and/or the NYLL.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which either pre-judgment or post-judgment interest, liquidated damages, or attorneys' fees may be awarded.

SIXTEENTH AFFIRMATIVE DEFENSE

Defendants have made all payments to plaintiff as required by applicable law, rules, and regulations, and acted in good faith with regard to such payments.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims against individual defendant Ramesh Shah are barred in whole, or in part, because defendant Ramesh Shah was not Plaintiffs' employer within the meaning of the FLSA and/or New York Labor Law and have no personal liability under the legal theories and/or factual allegations.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims against defendant Ramesh Shah is barred in whole, or in part, because defendant Ramesh Shah may not be held personally liable for the acts or omissions of the corporate defendant.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred to the extent plaintiff petitioned for bankruptcy under Chapter 7 or Chapter 13 of the United States Bankruptcy Code yet failed to disclose potential claims against defendants as required under the applicable Bankruptcy Code.

TWENTIETH AFFIRMATIVE DEFENSE

The Complaint is barred, in whole or in part, pursuant to the Portal-to-Portal Act.

TWENTY-FIRST AFFIRMATIVE DEFENSE

To the extent plaintiff has signed a release and/or waiver encompassing claims alleged in the Complaint or a contractual waiver or agreement contrary to his claims herein, his claims are barred by that release, waiver or agreement.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Plaintiff's FLSA claims are barred, in whole and/or in part, to the extent that plaintiff failed to timely satisfy the written consent requirements necessary to proceed as a collective action under the FLSA.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because he did not perform any work for which he was not properly compensated. Plaintiff cannot recover wages for any hours worked which were not reported in accordance with any applicable policies or procedures.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred as he was not an employee within the meaning of the FLSA and/or New York Labor Law.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred as he was an independent contractor and, therefore, not covered by the FLSA and/or New York Labor Law.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the economic loss rule.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of payment.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by election of remedies.

TWENTY-NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred to the extent that his work falls within the exemptions, exclusions, exceptions, or credits provided under the FLSA and/or New York Labor Law.

THIRTIETH AFFIRMATIVE DEFENSE

Plaintiff's claims are precluded in full and/or part by the existence of prior pending litigation and/or the doctrines of waiver, re judicata and/or collateral estoppel.

THIRTY-FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint should be dismissed in whole, or in part, because the Court lacks subject matter jurisdiction over some or all of plaintiff's claims.

THIRTY-SECOND AFFIRMATIVE DEFENSE

Defendants reserve the right to supplement these affirmative defenses as necessary based upon the evidence and information, including confirmation of plaintiff's identity, learned or revealed during the course of discovery in this matter.

WHEREFORE, the foregoing reasons, the defendants, by and through their counsel, respectfully request that this Court dismiss this action and award their fees and costs associated with the defense of this action, along with any and all other such relief as this Court deems proper.

Dated: New York, New York
September 19, 2016

Wood, Smith, Henning, and Berman, LLP

By:________________________________

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